

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 94-7

June 27, 1994

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: The Supervisory Status of Nurses

The Supreme Court in Health Care¹ rejected the Board's rule that a nurse's direction of less skilled employees, in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised "in the interest of the employer" as the Section 2(11) definition of supervisor requires.² The Court held that the dichotomy which the Board has created between acts taken in connection with patient care and acts taken in the interest of the employer is a "false dichotomy" that is inconsistent with the statutory language and the Court's decisions in Yeshiva University, 444 U.S. 672, 688 (1980), and Packard Motor Car Co., 330 U.S. 485, 488 (1947).

The Court emphasized, however, that it was only passing on the validity of the Board's "in the interest of the employer" test for determining supervisory status, and not on whether particular nurses would be supervisors under the proper test. Slip op. 2, 12, 13. It acknowledged that an examination of a nurse's duties to determine whether one or more of the 12 activities listed in Section 2(11) "is performed in a manner that makes the employee a supervisor is, of course, part of the Board's routine and proper adjudicative function," and that "[i]n cases involving nurses, that inquiry no doubt could lead the

¹ National Labor Relations Board v. Health Care & Retirement Corporation of America, U.S. Sup.Ct.No. 92-1964, decided May 23, 1994, 146 LRRM 2321.

² Section 2(11) defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Board in some cases to conclude that supervisory status has not been demonstrated." Slip op. 11-12.

Although the nurses involved in Health Care were "staff nurses" or "charge nurses" who had, among other duties, specific responsibilities to make daily work assignments, to monitor the work performed by aides to ensure proper performance, to counsel and discipline aides, to resolve aides' problems and to adjust grievances, many RN's and LPN's perform some of these or related duties as well. It is too early to predict what changes will evolve under the Health Care decision, but it is clear that we have to closely monitor them.

In order to determine the effect of the Supreme Court's Health Care decision on pending cases and what steps should be taken in applying Section 2(11) as the Court has directed,³ please inventory the nurses cases in your office. Submit to Advice all unfair labor practice cases, including cases recently faxed to us, where the question as to whether a nurse is a Section 2(11) supervisor turns on an analysis of the nurse's authority to assign or direct less skilled employees or on whether the nurse's exercise of authority requires the use of independent judgment. The Advice submission should contain a full description of all relevant facts pertaining to the supervisory question. These cases are likely to fall in the following categories: ULP test of certification cases and ULP cases where the supervisory status is raised as a defense to 8(a)(1) or 8(a)(3) conduct directed at nurses.

In addition to the foregoing, please provide a copy of all R case petitions affected by or arising from the Supreme Court Health Care decision to the Division of Operations-Management. These cases include petitions for certification or decertification, petitions for clarification, amendment, or revocation of a certification. Please attached to each petition a short paragraph setting forth the stages of the case and the position of the parties with respect to the disputed issues.

If you have any question concerning this memorandum, please contact Advice or Operations, as appropriate.

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³ With the Court having interpreted the phrase "in the interest of the employer" broadly to encompass the action of any employee in the course of his or her employment, Section 2(11) leaves the Board with two questions to resolve, and each must be answered in the affirmative if an employee is to be deemed a supervisor. "First, does the employee have authority to engage in one of the 12 listed activities? Second, does the exercise of that authority require the use of independent judgment?" Slip op. 2.